Filed 3/1/10 P. v. Lewis CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JEREMY JERMAINE LEWIS, Defendant and Appellant.	B212366 (Los Angeles County Super. Ct. No. GA069537)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jacqueline H. Nguyen, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

In this appeal, Jeremy Jermaine Lewis challenges his conviction of attempted second degree robbery, assault with a firearm, and assault likely to produce great bodily injury. He argues the record lacks sufficient evidence to support accomplice liability and to support a gang enhancement. He also challenges the number of presentence credits awarded by the trial court. We affirm.

PROCEDURAL BACKGROUND

In a second amended information, defendant and Rickey Trimaine Dowell were charged with attempted second degree robbery (Pen. Code, §§ 664, 211),[1] assault with a deadly weapon (§ 245, subd. (a)(1)), and assault with a firearm (§ 245, subd. (a)(2)). Firearm and gang enhancements were alleged.

Defendant and Dowell were tried together.[2] The jury convicted defendant of attempted second degree robbery and found that during the commission of the robbery, a principal used a firearm within the meaning of section 12022.53, subdivision (a). It also found defendant guilty of assault by means of force likely to produce great bodily injury and assault with a firearm. The jury concluded that both crimes were for the benefit of, at the direction of, or in association with a criminal street gang, in violation of section 186.22.

The court sentenced defendant to 16 months for the attempted robbery, plus 10 years for the firearm enhancement. Pursuant to section 12022.53, subdivision (e), the court struck the section 186.22 gang enhancement on the robbery count. Sentence on the other counts was imposed and stayed pursuant to section 654. The court also sentenced defendant to two years in San Bernardino case No.

---

[1] Undesignated statutory citations are to the Penal Code.

[2] We previously affirmed Dowell's conviction. (*People v. Dowell* (Aug. 20, 2009, B209493) [nonpub. opn.].)

FWV04031, for which defendant was incarcerated for committing a second degree robbery. The court awarded defendant 16 days of presentence credit.

FACTUAL BACKGROUND

On January 10, 2007, at about 11:30 p.m., Jesse Brown was seated in his parked car waiting for his friend Maryellen Dortch to return home from her nursing job. Brown was speaking to Dortch on his cell phone when he saw three males approach his vehicle. One of the men, Dowell, approached the driver's door, and pointed a gun at Brown. A second man, whom Brown did not know, stood at the passenger's door. A third man, defendant, stood about 15 feet away, at the back of Brown's car. Dowell opened the car door, and ordered Brown to get out. Brown did so and tried to flee. Dowell tripped Brown and severely beat him with a gun. Dowell also kicked and hit Brown. After beating Brown, Dowell asked Brown, "where is the money at?" and reached into Brown's pocket, tearing Brown's pants and causing the change in Brown's pocket to fall to the ground. As a result of the beating, Brown suffered a broken nose, lacerated face, loss of smell, breathing problems, and a resumption of seizures.

Defendant arrived with Dowell and a third unidentified person, and remained there the entire time Dowell was beating and robbing Brown. Brown recognized defendant because Brown had dated defendant's mother and had lived with defendant and his mother for a year. When a car came down the street, defendant yelled, "come on, let's go. Let's get out of here." Defendant, Dowell, and the unidentified man ran away. During cross-examination, Brown acknowledged the third, unidentified man could have said "let's go," but Brown repeatedly reaffirmed his belief that defendant uttered those words.

Dortch testified that, on January 10, 2007, she was speaking to Brown on the phone while driving home from work, and heard scuffling in the background. Dortch passed defendant before she arrived home, and asked defendant what had

happened to Brown. Defendant responded that he did not know anything. As soon as she saw Brown, Dortch called 911. Dortch informed the operator what had happened to Brown and added that shortly after the incident, she saw three men "running sporadically, looking back, [and] hiding behind cars . . . ." Defendant later told Dortch that he wished the incident with Brown had not happened.

Detective Scott Schulze testified as a gang expert. He opined that both Dowell and defendant were members of the Du Roc Crips, a gang that claimed turf in the location where Brown was beaten. Dowell's moniker was Du Dirty and defendant was known as Worm. Defendant previously had admitted being a member of the Du Roc Crips. The Du Roc Crips were involved in murder, assaults, thefts, possession of firearms, robberies, and sale of narcotics.

Based on a hypothetical with facts similar to those of the instant case, Schulze opined that the crimes were committed for the benefit of a gang. An act of violence promotes the gang and intimidates the victims and others in the neighborhood. In addition, proceeds from a robbery may be used to purchase items that benefit the gang, including firearms and drugs. Schulze also based his opinion on the facts that at least two members of the Du Roc Crips were committing the crimes together, and that the violence perpetrated against the victim served to intimidate other potential victims and to further the gang's violent reputation. Schulze opined that the role of a person standing about 15 feet away, looking down the street while another gang member beat and robbed a victim was to act as a lookout and to provide backup assistance.

Cedric Brown (Cedric), who was not related to Jesse Brown (Brown), testified for the defense. Cedric was friends both with Brown and with defendant. On January 10, 2007, Cedric observed Brown and Dowell in mutual combat following a game of dice. According to Cedric, both Brown and Dowell attacked

the other, and neither used a weapon. Cedric watched this from a distance of about 20 to 25 yards.

DISCUSSION

Defendant challenges the sufficiency of the evidence that he aided and abetted Dowell and that the crimes were committed for the benefit of a gang. He also argues that he was entitled to four additional days of presentence conduct credit. As we explain, we find no error.

In evaluating the sufficiency of the evidence, we examine the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence, i.e., "evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053*; People v. Johnson* (1980) 26 Cal.3d 557, 578.) Testimony from a single witness is sufficient for the proof of any fact. (*People v. Richardson* (2008) 43 Cal.4th 959, 1030-1031.) We presume "in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Kraft, supra*, 23 Cal.4th at p. 1053.) ""'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]"'" (*Id*. at p. 1054.) The same standards apply to evaluate the sufficiency of the evidence of a gang enhancement. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

1. *Substantial Evidence Supports the Finding that Defendant Aided and Abetted the Crimes*

"'A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime,

(iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.'" (*People v. Hill* (1998) 17 Cal.4th 800, 851.) Although presence at the scene of a crime is by itself insufficient to establish aiding and abetting liability, it is a circumstance that may be considered in deciding liability. (*People v. Laster* (1971) 18 Cal.App.3d 381, 388 ["while mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal"].) In addition to presence, "'companionship, and conduct before and after the offense'" may also be considered in evaluating whether a defendant aided and abetted a crime. (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Here, the jury's determination that defendant aided and abetted the attempted robbery and assault was supported by substantial evidence. Specifically, the evidence supported the inference that defendant acted as a lookout.[3] He arrived with Dowell and a third person. As Dowell proceeded to beat and rob Brown, defendant stood about 15 feet away. When a car approached, defendant warned Dowell and the other man, and the three fled together. When Dortch encountered defendant moments after the incident, he denied any knowledge of the crimes, suggesting a consciousness of guilt. Had defendant not participated in the crimes, he would have had no reason to deny knowledge of them when asked. Defendant's presence, companionship, and conduct before and after the crimes supported the jury's finding that he aided and abetted the crimes. (See *People v. Haynes* (1998)

---

[3] The trial court struck Brown's description of defendant as a lookout several times. One time, however, it remained in the record. In the context of discussing a hypothetical situation similar to the present case, Schulze opined that a person standing 15 feet away when a gang member committed a crime could have acted as a lookout. Even without Brown's or Schulze's testimony, the evidence that defendant stood 15 feet away and warned Dowell when a car was coming supported the inference that he was serving as a lookout.

61 Cal.App.4th 1282, 1294 [presence at the scene of a crime, companionship, and conduct before and after the crime are factors in determining aiding and abetting liability].)[4]

2. *Substantial Evidence Supports the Section 186.22 Gang Enhancement*

Section 186.22, subdivision (b)(1) provides: "Except as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished" with an enhanced sentence. The gang enhancement requires proof of two elements: (1) that the felony was committed for the benefit of, at the direction of, or in association with any criminal street gang; and (2) that the defendant harbored the requisite intent. Expert testimony may be used to prove the elements of the gang enhancement. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1047-1048.)

The first element of section 186.22, subdivision (b)(1), was satisfied by defendant's clear association with the Du Roc Crips, a criminal street gang as demonstrated by defendant's commission of the crime with Dowell, another

---

[4] Brown's acknowledgment on cross-examination that the third man could have said "let's go" does not compel a different result. The jury was entitled to accept Brown's testimony that it was defendant who said "let's go," especially in light of Brown's familiarity with defendant, his recognition of defendant's voice, and his reaffirmation that defendant was the speaker. (*People v. Haynes, supra,* 61 Cal.App.4th at p. 1294 ["jurors could accept in part and reject in part any witness's testimony"].)

member of that gang.[5] (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1332 [§ 186.22, subd. (b) is satisfied if the crime was committed in association with the gang with the intent to assist criminal conduct]; *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 [same]; but see *Briceno v. Scribner* (9th Cir. 2009) 555 F.3d 1069, 1081, fn. 4 [questioning *Morales*].)

The evidence also showed that defendant had the specific intent to promote criminal conduct by gang members. (See *People v. Ochoa, supra*, 179 Cal.App.4th at p. 661, fn. 6 [statute requires specific intent to assist further, or promote criminal conduct by gang members]; *People v. Villalobos, supra*, 145 Cal.App.4th at p. 322 [same]; but see *People v. Ramon* (2009) 175 Cal.App.4th 843, 853 ["The issue in the gang enhancement context was whether [the defendant] was acting with the specific intent of assisting his criminal street gang"].) Criminal conduct for purposes of the section 186.22 enhancement may include criminal activity of the charged crime. (*People v. Romero* (2006) 140 Cal.App.4th 15, 19-20, italics omitted [by its plain language, the statute requires a showing of specific intent to promote, further, or assist in "'any criminal conduct by gang members,'" rather than other criminal conduct]; *People v. Hill* (2006) 142 Cal.App.4th 770, 774 [same]; but see *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, 1104 [California law requires showing of intent to promote further or assist criminal activity other than the charged crime].)[6] Defendant assisted

---

[5] In *People v. Ochoa* (2009) 179 Cal.App.4th 650, the court found insufficient evidence to support a finding that a carjacking and possession of an illegal weapon were committed for the benefit of a gang. There, the defendant was alone when he committed the crime. (*Id.* at p. 654.) Here, two Du Roc members -- Dowell and defendant -- committed the crimes together.

[6] Defendant argues that the crimes were personal, based in part on Cedric's testimony and argument that Dowell was looking for specific money. Assuming the record supports defendant's interpretation contrary to the jury's findings, that

Dowell by acting as a lookout and warning Dowell to leave when a car drove up. The attempted robbery occurred in Du Roc territory and was committed following a severe beating. There was evidence that crimes involving such brutality instill fear in persons living in Du Roc territory.[7]

3. *Defendant Demonstrates No Error in the Calculation of His Conduct Credit*

The trial court sentenced defendant on both the instant case and the San Bernardino case. The trial court awarded no days of presentence credit on the instant case and 16 days of presentence credit on the San Bernardino case. Defendant argues that he was entitled to 20 days based on 14 actual days and 6 days of conduct credit. His calculation is correct under section 4019. However, because defendant was convicted of robbery in San Bernardino, he was limited to

---

does not require reversal. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054 [""""If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]""""].) In any event, defendant identifies only a possible motivation of Dowell, but no evidence of his own personal motivation.

Defendant's heavy reliance on *In re Frank S.* (2006) 141 Cal.App.4th 1192, is misplaced. In that case, a minor was stopped after failing to stop at a red traffic light while riding a bicycle. The minor was carrying a knife, a bindle of methamphetamine and a red bandana. (*Id*. at p. 1195.) The court found no evidence the defendant had a specific intent to promote, further, or assist in criminal conduct by gang members. (*Ibid*.) In contrast, here there was evidence defendant assisted Dowell by acting as a lookout during the assault and robbery. Defendant's reliance on *People v. Albarran* (2007) 149 Cal.App.4th 214, is similarly misplaced, as that case did not involve a challenge to the sufficiency of the evidence of a gang enhancement.

[7] Because we find substantial evidence supports the gang enhancement, we need not consider defendant's argument that the section 12022.53 enhancement must be reversed, as that argument is dependent on the reversal of the gang enhancement.

15 percent of work time credit under section 2933.1. (§§ 2933.1, subd. (c) [applying 15 percent limitation to violent felonies], 667.5, subd. (c)(9) [defining robbery as a violent felony].) Fifteen percent of 14 days is 2 days. Defendant demonstrates no error in the award of 16 days presentence conduct credit.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.